No. 83-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al.,

Petitioners,

v.

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF *AMICUS CURIAE* OF SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BEN B. BLACKBURN
G. STEPHEN PARKER*
ROBERT B. BAKER, JR.

SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

**Counsel of Record*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

In accordance with this Court's Rule 36.1, the Southeastern Legal Foundation, Inc. ("Southeastern"), moves the Court for leave to file the attached brief *amicus curiae* in the above case. Concurrent with the filing of this motion, Southeastern has sent the Clerk of this Court a copy of a letter of consent from the South Florida Chapter of the Associated General Contractors of America, Inc. Metropolitan Dade County, Florida has refused consent.

Southeastern supports the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Southeastern is a non-profit corporation organized for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court over the past eight years. Southeastern participated as *amicus curiae* in the instant case before the Eleventh Circuit Court of Appeals and now wishes to continue that participation before this Court.

Southeastern has filed numerous *amicus curiae* briefs in the federal courts at all levels regarding a wide variety of public interest issues. Expressing its opposition to racial goals and quotas, Southeastern submitted its views to both the Fifth Circuit and the Supreme Court in *United Steel Workers of America v. Weber*, 563 F.2d 216 (5th Cir. 1977), *reversed*, 443 U.S. 193 (1979); filed an *amicus curiae* brief in *Cramer v. Virginia Commonwealth University*, 586 F.2d 297 (4th Cir. 1978); and as *amicus curiae* urged the U. S. District Court for the Northern District of Alabama to initiate its *sua sponte* reconsideration of nationwide steel industry consent decrees, *United States v. Allegheny-Ludlum Industries*, No. CA 74-P-0339-S (N.D. Ala. March 21, 1978). Recently Southeastern submitted an *amicus curiae* brief in the case of *American Subcontractors Association, Georgia Chapter, Inc. v. City of Atlanta*, No. 40937 (argued in the Georgia Supreme Court on May 9, 1984), in which the City of Atlanta's Minority and Female Business Enterprise ordinance was challenged.

Whether exclusive racial set-asides may be used as one means to remedy the effects of past discrimination is an

issue which will directly affect many citizens living in the southeastern United States. There is a pressing need for this Court to examine the plethora of conflicting decisions rendered since *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and to set out a definitive standard by which race-conscious remedial legislative measures may be evaluated.

For the foregoing reasons, Southeastern respectfully urges the Court to grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

BEN B. BLACKBURN
G. STEPHEN PARKER*
ROBERT B. BAKER, JR.

Attorneys for Movant
Southeastern Legal Foundation, Inc.

**Counsel of Record*

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On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF *AMICUS CURIAE*

This brief is submitted by the Southeastern Legal Foundation, Inc. ("Southeastern") in support of the petition for certiorari filed by the South Florida Chapter of the Associated General Contractors of America, Inc., et al., No. 83-1872, seeking review of the Eleventh Circuit's decision in *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*, 552 F.Supp. 909 (S.D. Fla. 1982), *aff'd in part, rev'd in part*, 723 F.2d 846 (11th Cir. 1984).

INTEREST OF AMICUS

The interest of the Southeastern Legal Foundation and its reasons for participating in this case are set forth in the attached motion for leave to file this brief. That statement of interest is incorporated herein.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the brief on behalf of Petitioners, South Florida Chapter of the Associated General Contractors of America, Inc.

SUMMARY OF ARGUMENT

By upholding the ordinance challenged in this litigation, the Eleventh Circuit Court of Appeals has sanctioned an exclusive set-aside of a public contract for a defined minority group. The ordinance in question should be held unconstitutional under prior decisions of this Court.

This Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) established certain limitations and requirements for legislative use of racial classifications to remedy the effects of past discrimination. Those limitations were exceeded in this case, because the challenged ordinance did not contain adequate limitations with respect to duration or percentages, because it singled out a particular racial group and bestowed benefits upon it to the exclusion of other minority groups, and because the ordinance was not enacted by a body competent to utilize race-conscious remedies.

Since this Court's decision in *Fullilove, supra*, there have been numerous and often conflicting decisions by state and federal courts as to the utilization of race-con-

scious remedial measures. The Eleventh Circuit's opinion in this case is in conflict with a 1981 opinion of the Supreme Court of Alabama dealing with the same questions. Without resolution of the conflicts and uncertainties in this area of the law, there will be a lack of uniformity in the decisions of the various courts throughout the country which are called upon to adjudicate challenges to legislation of this type. Clarification by this Court is also necessary to restrain municipalities and other local governmental units from utilization of race-conscious measures where they are not appropriate.

ARGUMENT

I. INTRODUCTION

The petition for certiorari in this case once again presents this Court with the extraordinarily difficult problem of "how to promote equal opportunity for minorities in ways consistent with other key societal objectives and values." A. Sindler, *Racial Preference Policy, the Political Process, and the Courts*, 26 Wayne L.Rev. 1205 (1980). Such cases present the complex "social conundrum of nourishing ethnicity in an effort to starve it." *Vuyanich v. Republic National Bank of Dallas*, 505 F.Supp. 224, 394 (N.D. Tex. 1980) *rev'd* 723 F.2d 1195 (5th Cir. 1984). Fully aware of this Court's having declined several other recent opportunities to address these issues, *e.g.*, *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *reh'g denied*, 712 F.2d 222 (1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 703 (1984), Amicus respectfully urges this Court to review and overturn the lower court's decision in this case, which upholds a governmental use of racial preferences far beyond that sanctioned by a plurality of this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). (Hereafter "*Fullilove*").

Amicus fundamentally contends that the use of racial criteria sanctioned by the Court of Appeals in this case is inconsistent with this Court's decisions in *Fullilove, supra,* and related cases, because the Dade County ordinance does not satisfy the requirements set forth in those decisions. Further, Amicus urges the Court to review this case because of the growing number of cases in state and federal courts which are producing different results in judicial review of legislative efforts at many levels to utilize racial classifications. As an example of the uncertainty in this area, the lower court did not follow any test set forth by any of the various opinions of the members of the plurality court in *Fullilove,* choosing instead to rely on what the three-judge panel "perceive[d] as the common concerns to the various views expressed in *Bakke* and *Fullilove* . . ." (App. A at 10a). Because the constitutional rights of innocent third parties are affected by any governmental use of racial classifications, there is a need for some degree of uniformity, or at least further guidance from this Court, to enable the lower federal and state courts to adjudicate the difficult issues presented by these cases.

Only recently this Court has reiterated that classifications based upon race are inherently suspect and are in fact likely to "reflect racial prejudice rather than legitimate public concerns . . ." *Palmore v. Sidoti,* ___ U.S. ___, 52 U.S.L.W. 4497, 4498 (April 25, 1984). The instant case presents a situation in which the most exacting scrutiny of the legislative choice, in this case that of a local county government, should be applied.

The Court of Appeals, however, upheld the county's use of racial classifications and overturned the district court's determination that the setting aside of a contract

for a specific public project for a particular racial group was unconstitutional. One of the factors relied upon by the Eleventh Circuit panel was that the racial preference in question affected only a relatively small portion of the entire amount of governmental expenditures for the overall project. (App. A at 18a). Amicus urges this Court not to accept a quantitative analysis of the effects of unconstitutional racial classifications by government. An unconstitutional ordinance is not rendered palatable because only a few citizens are injured in its application.

II. UNDER PRIOR DECISIONS OF THIS COURT, THE DADE COUNTY ORDINANCE SHOULD BE HELD UNCONSTITUTIONAL.

The Eleventh Circuit's decision to uphold the Dade County ordinance sets a unique precedent by allowing government sanctioned 100% minority set-asides. In no other case since the decisions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Hereafter "*Bakke*"), and *Fullilove*, have the federal or state courts had to determine the constitutionality of a statute which permitted a single minority group to have exclusive bidding rights for a government contract. Rather than setting aside a percentage of the total contract or contracts which may be let in a year or for a particular project, the Dade County ordinance goes beyond the standard minority business enterprise statute modeled after the federal statute upheld in *Fullilove*, and permits one racial minority to have a monopoly on the bidding for a particular county construction project. This government sanctioned monopoly is anticompetitive and sets a harmful precedent for the future of all affirmative action programs. If the Dade County race-conscious ordinance is allowed to stand, municipalities and cities throughout

the nation can adopt a variety of race-conscious programs of infinite variation, thus creating a serious impediment to competitive bidding in interstate commerce.

The Dade County race-conscious ordinance is a radical departure from previous minority business enterprise statutes because it requires other disadvantaged non-black minorities to bear a disproportionate share of the burden to aid black contractors who have allegedly been victims of discrimination. The ordinance under attack is unique because a single racial minority group benefits from the application of the law. Rather than allowing the Dade County Commission to set aside various construction projects for all "minorities," the ordinance only permits blacks to benefit from the law. (App. A at 23a-33a). This means that in addition to members of the majority suffering a competitive and economic disadvantage, non-black minorities must also suffer.

The excluded minorities are therefore victims of an arbitrary and capricious racial classification. This Court has frequently struck down racial classifications and distinctions as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967), quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Notwithstanding the motivation behind the Dade County ordinance, the effect of the ordinance is to further discriminate against non-black minorities. Race becomes an unacceptable classification when a race-conscious remedy designed to aid one minority group results in discrimination against another. Such legislation approaches an unconstitutional "desire to prefer one racial or ethnic group over another." *Fullilove*, 448 U.S. at 497 (concurring opinion by Justice Powell).

The Court of Appeals for the Sixth Circuit has recently upheld the authority of the State Legislature of Ohio to enact a minority business enterprise statute. *Ohio Contractors Association v. Keip*, 713 F.2d 167, (6th Cir. 1983). In discussing the burden imposed upon non-minority contractors by the statute, the Court of Appeals stated:

> It is clear that members of the majority can be required to bear some of the burden which inevitably results from affirmative efforts to rectify past discrimination. Even if it is assumed that the Plaintiffs in this action are innocent of discriminatory conduct themselves, they are part of a group which did reap competitive benefit from past discriminatory practices of the state that have virtually excluded minority contractors from state business. It was within the power of the General Assembly to require the non-minority contractors to assume a reasonable burden. *See Fullilove*, 448 U.S. at 484-85, 100 S.Ct. at 2777-78.

713 F.2d at 173.

Under the Sixth Circuit's decision in *Ohio Contractors*, a non-minority business must bear an increased economic burden when affirmative efforts are made to rectify past discrimination. The underlying rationale would appear to be that the majority must give back some of the competitive benefit they have previously received, due to past discrimination against minorities. Such a rationale for the distribution of the sharing of this burden is inapposite, when innocent non-black minorities are also required to endure the loss of competitive equality in the marketplace for the sake of remedying allegedly discriminatory behavior that they had no part in perpetuating. These minority contractors are thus being forced to assume more than "a reasonable burden" in the case *sub judice*.

Because the Dade County ordinance lacks durational

and percentage limitations, because it grants an exclusive benefit to a single minority group, and because it conflicts in other respects with this Court's decisions in *Fullilove* and *Bakke*, this Court should hold it unconstitutional.

III. THE DECISION BY THE COURT OF APPEALS IS AN EXAMPLE OF THE CONFLICTING OPINIONS BY STATE AND FEDERAL COURTS ON THE USE OF RACIAL CLASSIFICATIONS BY GOVERNMENT; THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THESE CONFLICTS.

Underlying this Court's decision in *Fullilove* was the recognition that the United States Congress had the authority to enact legislation requiring that a portion of government contracts be set aside for minority business enterprises. As stated in Chief Justice Burger's opinion, in applying the rigid standard of review appropriate for any use of racial criteria, "we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution . . ." with the power to provide for the general welfare and to enforce the equal protection guarantees of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472. The Chief Justice's opinion further stressed that "we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President." 448 U.S. at 473. The deference to Congressional authority to enact remedial measures was stressed again in stating that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S. at 483.

The question of the ability of governmental units below that of the United States Congress to utilize race-conscious remedies has produced a conflict of opinions among the various state and federal courts, as well as among the commentators who have attempted to analyze *Fullilove*. In upholding the authority of the Dade County Commission to enact race-conscious measures granting preferential treatment to black contractors in certain county contracts, the Eleventh Circuit's decision has created a conflict between that court and the highest court of one of the states comprising the Eleventh Circuit on a matter of federal law.[1] Such a conflict, arising directly out of decisions of this Court on federal issues, constitutes yet another reason for this Court to grant the writ of certiorari. *See, e.g., Lego v. Twomey*, 404 U.S. 477, 479 (1972).

In *Arrington v. Associated General Contractors*, 403 So.2d 893 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982) (Hereafter "*Arrington*"), the Alabama Supreme Court concluded that the City Council of Birmingham, Alabama could not enact a minority business enterprise ordinance, under the standards set forth in *Fullilove*. The Alabama Supreme Court specifically held that a city ordinance requiring a 10% minority business enterprise participation in city contracts was violative of the Equal Protection Clause of the Fourteenth Amendment, under *Fullilove* and *Bakke*, partly because "the Birmingham City Council is not a competent body to identify and address past constitutional or statutory violations . . ." *Arring-*

[1] Although the lower court appeared to analyze this question as one of State law (App. A at 11a-12a), it is clear from this Court's opinions in *Fullilove* and *Bakke* that the authority of the governmental unit to enact such legislation is of critical importance to its constitutionality.

ton, 403 So.2d at 900. Rejecting an argument based upon the City's exercise of limited police powers, the Alabama Supreme Court noted that the ordinance was not imposed under the broad remedial powers of the United States Congress, nor under the equitable jurisdiction of a court. 403 So.2d at 901. Although the *Arrington* decision did not rest exclusively on the ground that the city council was an inadequate body to enact race-conscious legislation, the Alabama Supreme Court's resolution of this issue conflicts with the Eleventh Circuit's, as to the level of government authorized to enact legislation of this type.

In *Ohio Contractors Association v. Keip, supra*, the Sixth Circuit concluded that the General Assembly of the State of Ohio had the authority to enact a minority business enterprise statute. Perhaps a state legislature, elected by the entire population of the State to represent a broad range of groups and interests, is comparable to the U. S. Congress, within the meaning of the *Fullilove* decision. At the county commission level or city council level, however, there should not be a presumption in favor of the legislative resolution of this matter, in which the constitutional rights of non-minorities can be adversely affected.

An Act of Congress, by its nature, has a uniform application throughout the land which is within the grasp of understanding by all potential bidders for federally financed construction. The understanding and uniform application of law attendant to congressional enactments does not exist for city and county ordinances. Local pressures and prejudices unavoidably are reflected in acts of local governmental units. It is imperative that this Court sharply limit the authority to implement race-conscious laws and ordinances to the United States Congress if great confusion and mischief is to be avoided.

Even Acts of Congress must be subject to strict, and limited, application so as to not violate the Equal Protection Clause of the Fourteenth Amendment.

Another even more fundamental conflict between the decision of the Alabama Supreme Court in *Arrington, supra,* and the decision of the Eleventh Circuit below is the application of different standards of review. In *Arrington,* the Alabama Supreme Court chose to apply the more stringent standard of review advocated by Justice Powell in *Fullilove, supra,* and *Bakke, supra.* "We believe that the approach of Justice Powell is fairly representative of a more rigorous standard of review, and for purposes of this opinion we will employ the analytical framework proposed by him." 403 So.2d at 900. This application of a strict scrutiny standard led the Alabama Supreme Court to conclude that the Birmingham ordinance violated the Equal Protection Clause of the Fourteenth Amendment.

In contrast to *Arrington,* the Eleventh Circuit opinion applied a less demanding test than that utilized by the Alabama Supreme Court in *Arrington.* Rejecting a strict scrutiny analysis, the Court summarized its own test as follows:

> We rely instead on what we perceive as the common concerns to the various views expressed in *Bakke* and *Fullilove:* (1) that the governmental body have the authority to pass such a legislation; (2) that adequate findings have been made to insure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.

(App. A at 10a). (Emphasis by the Court).

The significance of which test is to be utilized should not be understated. By utilizing the less demanding test, the Court below upheld an ordinance permitting a 100% racial set-aside for a specific contract. The Birmingham ordinance, struck down under the strict scrutiny test in *Arrington*, provided for a 10% set-aside for participation by minority business enterprises in various governmental contracts.

In view of the conflict between decisions of the Supreme Court of Alabama and of the Eleventh Circuit Court of Appeals, both with respect to the applicable tests under which race-conscious legislation must be reviewed, and as to the authority of a local governmental unit to enact such legislation, this Court should grant the writ of certiorari and resolve the issues presented by this case. Review by this Court would also serve to provide needed guidance for State and lower federal courts in determining the constitutionality of race-conscious legislation.

CONCLUSION

Southeastern respectfully urges this Court to grant the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and to reverse the decision of the Court of Appeals.

Respectfully submitted,

BEN B. BLACKBURN
G. STEPHEN PARKER*
ROBERT B. BAKER, JR.

SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

**Counsel of Record*